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Proceedings include all events.
94 - 7150 Grossbard, et al v. President, et al
Official Caption 1/
Docket no. (s) : 94- 7150

RHODA GROSSBARD; RHODA GROSSBARD, Conservator of the property of Jules Grossbard; DAVID GORDON; DAVID GORDON, Attorney in fact for Rhoda Grossbard,

Plaintiffs - Appellants,

v.

PRESIDENT CONTAINER, INC., MARVIN GROSSBARD; GEORGE GROSSBARD; MARVING & GEORGE GROSSBARD; As executors of the estate of Rose Grossbard; JILLDARVY REALTY CORPORATION.

Defendants - Appellees,

IN THE MATTER OF THE ESTATE OF ROSE GROSSBARD, DECEASED.

Authorized Abbreviated Caption 2 /
Docket no. (s) : 94 - 7150
GROSSBARD V. PRESIDENT CONTAINER

1/ Fed. R. App. P. Rule 12(a) and 32(a).
2/ For use on correspondence and motions only.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
Clerk

Date: November 8, 1994

Hutton, Ingram, Yuzek,
Gainen, Carroll & Bertolotti
250 Park Ave.
New York, NY 10177

Re: Grossbard v. President Container
Docket No: 94-7150

Dear Counsel:

Enclosed is a copy of the caption page which has recently been change in the above referenced appeal.

In the event that your brief has already been submitted, please be advised that the cover of the brief must be altered to reflect the change in official caption.

Sincerely,
GEORGE LANGE III, Clerk

/s/ Frank Perez
Frank Perez
Deputy Clerk, USCA

-cap amd
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Caption Amended

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of September, one thousand nine hundred and ninety-four.

Present:

Honorable George C. Pratt
Honorable Pierre N. Leval
Honorable Guido Calabresi
Circuit Judges.

RHODA GROSSBARD, Conservator of the property of Jules Grossbard, DAVID GORDON, Attorney-in-fact for Rhoda Grossbard,

Plaintiffs-Appellants,

v.

PRESIDENT CONTAINER, INC., MARVIN GROSSBARD, GEORGE GROSSBARD, MARVIN & GEORGE GROSSBARD, As executors of the estate of Rose Grossbard, JILLDARVY REALTY CORPORATION,

ORDER
94-7150

Defendants-Appellees,

and

IN THE MATTER OF THE ESTATE OF ROSE GROSSBARD, DECEASED.

Appeal from the United States District Court for the Southern District of New York (William C. Conner, Judge).

This cause came on to be heard on the transcript of record from the United States District Court and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the ruling of the district court is affirmed.

We affirm Judge Conner's order of dismissal based on the absence of a properly pleaded basis of federal jurisdiction, for the reasons given by him. To the extent plaintiffs now seek to rely on jurisdictional bases not presented to the district judge; they may not do so.

/s/ George C. Pratt
Hon. George C. Pratt, U.S.C.J

N.B. THIS SUMMARY ORDER SHALL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

/s/ Pierre Leval
Hon. Pierre N. Leval, U.S.C.J

/s/ Guido Calabresi
Hon. Guido Calabresi, U.S.C.J

UNITED STATES DISTRICT COURT (Filed Jan. 20, 1994)
SOUTHERN DISTRICT OF NEW YORK

RHODA GROSSBARD, RHODA GROSSBARD, Conservator of the Property of JULES GROSSBARD, DAVID GORDON, DAVID GORDON Attorney-in-Fact for RHODA GROSSBARD,	:
Plaintiffs,	:93 Civ. 0435 :(WCC)
-against-	:
PRESIDENT CONTAINER, INC., MARVIN GROSSBARD, GEORGE GROSSBARD, MARVIN GROSSBARD AND GEORGE GROSSBARD, as Executors of the Estate of ROSE GROSSBARD, JILLDARVY REALTY CORPORATION,	: 72598 : OPINION :AND ORDER
Defendants,	:
and	:
IN THE MATTER OF THE ESTATE OF ROSE GROSSBARD, DECEASED.	:

APPEARANCES:

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MR. DAVID GORDON
Plaintiff Pro Se
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New York, New York 10021

CONNER, D.J.:

Plaintiffs Rhoda Grossbard and David Gordon bring this action pro se against President Container, Inc., (" PCI "), and Marvin and George Grossbard (" the Grossbards ") individually and as executors of the estate of Rose Grossbard. Twelve years ago we dismissed this family dispute for lack of jurisdiction. Nothing has changed in the past twelve years to make us rule differently today. Hence defendants' current motion to dismiss for lack of jurisdiction is once again granted and the Complaint is dismissed with prejudice. Defendants' motion for sanctions under Rule 11 of Federal Rules of Civil Procedure, however, is denied.

BACKGROUND

In 1981 plaintiff Rhoda Grossbard filed claims in this Court for breach of contract, false representation, conversion and duress in connection with the settlement of prior dispute against PCI and the Grossbards. We dismissed the complaint on jurisdictional grounds for lack of diversity of citizenship.

In the twelve years since our first dismissal, plaintiff has filed similar complaints against the same defendants in New York and New Jersey state courts to no avail. Plaintiff now returns to this Court pro se with her son, David Gordon, as a second plaintiff. While the complaint is at best confusing, it appears that plaintiffs are incorporating the original and amended complaints filed in New Jersey Superior Court and New Jersey Chancery Court, which assert claims for breach of contract and extortion and request an accounting of the estate of Rose Grossbard.

For the reasons discussed below, defendants' motion to dismiss is granted, but their motion for Rule 11 sanctions is denied.

DISCUSSION

I. Motion to Dismiss for Lack of Subject Matter Jurisdiction

A. Diversity Jurisdiction Under 28 U.S.C. § 1332

As explained in our prior opinion, we do not have subject matter jurisdiction under 28 U.S.C. § 1332 because there is not complete diversity of citizenship. Plaintiff Rhoda Grossbard is a citizen and resident of New York. Defendant PCI is incorporated in New York, and thus is also a citizen of New York. Hence there is no diversity and this court lacks jurisdiction. See Grossbard v. President Container, Inc., No.81-1704, slip op. at 3 (S.D.N.Y. Sept .21, 1981) (citing State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1967)).

Plaintiffs argue that PCI is not a resident of New York because, contrary to what this Court found in 1981, PCI is incorporated in New Jersey, not New York.[1] Plaintiffs point to three documents signed in 1965 by George Grossbard, President of PCI, which bear the impression of a seal reading "President Container, Inc., Incorporated New Jersey." Rather than producing these documents in full, plaintiffs submit photocopies of the lower portions revealing only Mr. Grossbard's signature and the purported seal.

In response, PCI submits Certification by the Secretary of State of the state of New York verifying PCI's status as a New York Corporation, and a Certificate of Standing issued by the state of New Jersey which confirms that PCI is a foreign corporation in New Jersey. In addition, PCI submits an affidavit by Marvin Grossbard, President of PCI, stating that PCI was incorporated in 1955 in the state of New York, and that while PCI has been

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[1] Plaintiff now apparently withdraw this argument, but we are addressing the issue because it is in the Complaint.

qualified to do business in New Jersey since 1966, it has never been incorporated in New Jersey.

We are convinced, just as we were twelve years ago, that PCI is in fact a New York Corporation. Plaintiffs have not produced any records from the state of New Jersey or New York contradicting the certifications submitted by PCI. And even if PCI did use at one time, whether inadvertently or intentionally, a seal indicating that it was a New Jersey Corporation, such conduct could not change its actual state of incorporation for purposes of diversity. As the official records reveal, PCI is in fact incorporated in the state of New York, and because plaintiff is also a citizen of New York, there is no diversity of citizenship.

B. Federal Question Jurisdiction Under 28 U.S.C. § 1331

Pursuant to 28 U.S.C. § 1331, district courts have jurisdiction over " all civil actions arising under the Constitution, laws, or treaties of the United States. " The instant Complaint asserts that the action " arises under the Fifth and Fourteenth Amendment, Section 1, to the Constitution of the United States. " Compl. ¶ 1. Plaintiffs suggest that their constitutional rights were implicated when " plaintiff was unconstitutionally denied access to the proper forum in New Jersey, sent back to New York with an abdication of jurisdiction by New Jersey courts, which New York's courts refused to recognize or even comment on, and has never had her case heard on the merits anywhere. " Compl. ¶ 9.

Plaintiffs fail to appreciate the fundamental concept of " state action." The Fifth and Fourteenth Amendments are implicated, and hence confer jurisdiction, only when government action is involved. Public Utilities Commission v. Pollak, 343 U.S. 451, 461 (1952); Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 924 (1982). The instant case is a dispute between private parties. While plaintiffs argue that they have been unfairly treated

by various state officials, none of these officials is named in the instant case. Rather, the Complaint alleges that PCI and the Grossbergs breached a contract and committed various frauds against plaintiffs. This alleged conduct by private parties does not constitute " state action." See, e.g., Kops v. New York Telephone, 456 F. Supp. 1090, 1093-94 (S.D.N.Y. 1978), aff'd, 603 F.2d 213 (2d Cir. 1979). Plaintiffs cannot simply invoke the federal constitution in a private action and expect this assertion to confer jurisdiction on this Court. There is no federal question involved in this case and hence no jurisdictions based on § 1331.[2]

II. Motion for Rule 11 Sanctions.

The defendants request that plaintiffs be sanctioned under Federal Rule of Civil Procedure 11 because the instant Complaint is " just the latest chapter in a long sag of baseless and frivolous claims brought against defendants over a period of more than 12 years. "

While we agree that the filing of the instant Complaint constituted a waste of time for defendants and this Court, we give deference to the pro se status of plaintiffs. Moreover, because we are dismissing the case on jurisdictional grounds we are not in a position to judge the frivolity of the claims alleged. Hence we decline to issue sanctions, but dismiss the Complaint with prejudice.

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[2] Because we are dismissing the Complaint for lack of jurisdiction, we find it unnecessary to address defendants' alternative arguments, although there are obvious statute of limitation problems.

CONCLUSION

The Complaint is dismissed with prejudice because this Court lacks subject matter jurisdiction. Defendant's Motion for Sanctions under Federal Rule of Civil Procedure 11, however, is denied.

SO ORDERED

Dated: January 7, 1993
New York, New York

/s/ William C. Conner
United States District Judge

UNITED STATES CONSTITUTION AND STATUTES

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE ANNOTATED, TITLE 29.
LABOR
CHAPTER 18 - EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER 1 - PROTECTION OF EMPLOYEE BENEFIT RIGHTS
SUBTITLE A - GENERAL PROVISIONS

Current through P.L. 103-354, approved 10-13-94, ERISA § 1003. Coverage, provides in part:

> (a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this

subchapter shall apply to any employee benefit plan if it is established or maintained -

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
(3) by both.

PUB.L. 93-406, TITLE 1, § 4, SEPT. 2, 1974, 88 STAT. 839. AS AMENDED PUB.L. 101-239, TITLE VII, § 789(A)(1), DEC. 19, 1989, 103 STAT. 2445.

THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO), 18 U.S.C. § § 1961 - 1968 (1982), WAS ENACTED AS TITLE IX OF THE ORGANIZED CRIME CONTROL ACT OF 1970, PUB.L. 91-452 (1970).

The essence of civil RICO law is represented by the following provisions of Sections 1961, 1962, and 1964:

The private right of action is conferred by Section 1964(c) of the Act which says, " (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. "

Section 1962 of the Act, labeled " Prohibited Activities ," says in part:

" (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income in acquisition of any interest in, or the establishment or

operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . . "

In Section 1961 of the Act Racketeering activity is defined as any one of four classes of enumerated offenses; and a " pattern of racketeering activity, " as defined in Section 1961(5) " requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity. "